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No. 04-0505

Supreme Court, U.S.
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In The

Supreme Court of the United States

GLENN J. CONROY,

Petitioner,

v.

ABRAHAM CHEVROLET-TAMPA, INC.,
d/b/a AUTOWAY CHEVROLET,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action for unlawful age discrimination, whether it constitutes automatic reversible error for a trial court to refuse to give a plaintiff's requested "pretext" instruction to the jury, when the jury instructions actually given accurately and adequately explained the law, the plaintiff's counsel is allowed to argue pretext to the jury, and there is no reasonable chance that the jury was misled in its deliberations.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Parties to Lawsuit

Abraham Chevrolet-Tampa, Inc.

Glenn J. Conroy

Other Interested Persons and Corporate Disclosure Statement

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AutoNation Enterprises, Inc.

AutoNation, Inc.

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The Carlyle Appellate Law Firm

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Equal Employment Opportunity Commission

First Team Automotive Corp.

First Team Management, Inc.

INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

The Florida Appellate Alliance, P.L.C.

Foley & Lardner

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The Hon. Joseph H. Rodriguez

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JURISDICTION

The respondent, Abraham Chevrolet-Tampa, Inc., d/b/a Autoway Chevrolet ("Abraham Chevrolet"), agrees with the jurisdictional statement contained in the petition filed by the petitioner, Glenn J. Conroy ("Conroy"). The district court's final judgment was entered on October 21, 2002. R:52.[1] On October 24, 2002, Conroy filed a timely motion for a new trial under rule 59 of the Federal Rules of Civil Procedure. R:53. The district court denied that motion through an order entered on February 13, 2003. AP:19a-29a; R:59. Conroy appealed to the United States Court of Appeals for the Eleventh Circuit through a timely notice of appeal filed on March 14, 2003. R:60.

The court of appeals's decision issued on June 30, 2004. *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228 (11th Cir. 2004); AP:1a. Conroy filed no post-decision motions. Because this Court granted Conroy a two-week enlargement of time to file his petition for certiorari, Conroy's petition to this Court was timely under rule 13 of this Court's rules, and the Court otherwise has jurisdiction over this case pursuant to 28 U.S.C. Section 1254(1).

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[1] The record on appeal is cited as "R:___," according to docket number. When appropriate, specific page numbers are given as well. Thus, for example, the citation "R:66:54" would refer to page 54 of the transcript docketed as item 66. Conroy's petition is cited as P:___, according to page number. The appendix to Conroy's petition, setting forth the opinion of the court of appeals and the district court's order denying Conroy's motion for a new trial, is cited as AP:___, according to page number.

STATEMENT OF THE CASE

A. Conroy's Employment and Termination

Conroy, the plaintiff in the district court, prosecuted two claims against Abraham Chevrolet, Conroy's former employer. First, he contended that he was fired because of his age. Second, he alleged that he was fired in retaliation for his refusal to fire an older salesperson, Dick Weber. R:1:3-5. Conroy attributed the alleged wrongful acts to William Bledsoe, the former general manager of the Abraham Chevrolet dealership.[2] *See, e.g.*, R:66:54; AP:2a-3a.

Conroy, who was born in 1946, began working in the commercial (or "fleet") department of Abraham Chevrolet in March 2000. R:66:37, 135; AP:2a. Bledsoe became general manager of the dealership – both the commercial department and the retail department – in October or November of 2000. R:66:130-31; AP:2a.

Several witnesses questioned Bledsoe's qualifications and competence to act as general manager for the dealership. R:65:68, 93, 95-96; R:66:30. According to some former employees of Abraham Chevrolet, Bledsoe also allegedly made comments that apparently led some people to believe that he favored younger workers. R:65:24, 28-28, 51-56, 128-30; R:66:14-15, 29, 38-39, 40, 128; AP:3a. At least one of those former employees intended to file his own lawsuit against Abraham Chevrolet. R:66:24. Another of them currently works with Conroy. R:65:86.

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[2] Conroy's complaint also included an ERISA claim. R:1:5. The district court ruled that Conroy was not entitled to a jury trial on that claim. R:24:8-9. Conroy apparently abandoned that claim at some unspecified point thereafter. AP:4a n.1.

Others who worked with Bledsoe at Abraham Chevrolet, however, disputed that Bledsoe made age-insensitive comments, saying that they had never heard Bledsoe make so-called "ageist" remarks. R:65:154; R:67:82. Bledsoe himself testified that he was speaking figuratively, not literally, when he spoke of a desire for younger, more aggressive sales people. R:66:127-28, 165-66. Moreover, he completely denied making some of the age-insensitive remarks that were attributed to him by disgruntled former employees.[3] R:66:177-79.

During the relevant time frame, the employees of Abraham Chevrolet were almost evenly split between those under 40 (49 percent) and those over 40 (51 percent). R:67:47. While Bledsoe was general manager, approximately ten percent of each group was fired. R:67:47-48. Nonetheless, while he was there, Bledsoe increased the pay of all of those in the commercial department (except Conroy), including the older salespersons. R:66:65-66.

The commercial department was "grossly underperforming" and falling short on established benchmarks. R:66:197, 218. During the operative period of time, the dealership was ranked fifth out of eight. R:66:67. Bledsoe thus had several conversations with Conroy about the failure of the commercial department to perform up to expectations. R:66:196, 200; AP:3a. Bledsoe likewise

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[3] The statement of Bledsoe quoted in Conroy's petition (P:2 n.2) – which Conroy uses in an attempt to show Bledsoe's alleged preference for younger workers – actually came from Bledsoe's deposition. That statement was not introduced as substantive evidence at trial; rather, it was merely used in an attempt to impeach Bledsoe through an alleged prior inconsistent statement. R:66:133. The parties agreed to a jury instruction telling the jury not to consider such impeachment as substantive evidence. R:67:179-80; R:49:13.

expressed to Abraham Chevrolet's controller concerns about the deficient performance of the commercial department. R:67:113, 116-17, 120-21.

According to Bledsoe, Conroy tried to blame Weber, in part, for the department's substandard performance, and Conroy even asked for permission to fire Weber, who was in his early 70s at the time. R:66:196, 217; AP:3a. Weber and Conroy did not get along. R:67:66-67. Bledsoe responded to Conroy's request by stating that Conroy could "get rid" of Weber if Weber was indeed the reason for the commercial department's poor performance. R:66:216; AP:3a.

Conroy, however, testified that Bledsoe asked him to fire Weber, stating that Bledsoe referred to Weber at that time as "the old geezer." R:66:41-42, 52; AP:3a. Bledsoe had allegedly used that description in reference to Weber at other times as well. R:65:58, 129-30. Bledsoe stated that he used that phrase and others (such as "old fart") merely as "expressions" or as "slang." R:66:129-30, 164-65. And, in fact, Weber "fairly frequently" referred to himself in a self-deprecating way on the subject of his age. R:65:114. He testified that he would not be offended by being called "an old geezer." R:67:69-70.

Conroy's testimony that he was instructed to fire Weber was called into serious doubt. *See, e.g.*, R:66:59-63. Bledsoe denied that he ever gave such an instruction to Conroy. R:66:128, 134, 215; AP:3a. Bledsoe also denied ever referring to Weber as "dead wood." R:66:176. Instead, when Bledsoe used that expression, he was referring to unproductive employees in general, but not any employees in particular. R:66:176-77. Similarly, Weber himself

testified that Conroy never told him of Bledsoe's alleged desire to get rid of him. R:67:66.

Indeed, it would have been most foolish for Bledsoe to give such an order, for Weber was selling more vehicles that everyone else at the dealership combined. R:66:77; AP:3a. He had 56 percent of the sales for the entire commercial fleet in 2000. R:67:67-68; AP:3a. Weber consistently achieved his success even though he is "physically impaired," with some difficulty walking at a brisk pace. R:66:134, 195.

In fact, Weber was the only salesperson in the commercial department whose job performance was not below standard. R:66:201. He was the only one who averaged sales of 12 or more vehicles per month. R:66:125-26. Indeed, the best salespersons at Abraham Chevrolet was over the age of 40, averaging 52-53 years old. R:67:42. Nonetheless, except for Weber, all of the commercial sales people, including Conroy, were too complacent, in Bledsoe's view. R:66:204.

When Conroy was fired, Weber had no fear that his employment would also be terminated. R:67:69. In fact, close to the time that Conroy's employment was terminated, Weber was promoted and received a pay increase. R:66:49. Weber's promotion and pay increase occurred well before Conroy threatened to file suit or began alleging that he had been the victim of age discrimination. R:67:29.

Weber continues to work at Abraham Chevrolet. R:66:63; R:67:65. In fact, of the salespersons employed in the commercial department at the time Conroy was employed by Abraham Chevrolet, Weber is the only one who was still employed by Abraham Chevrolet at the time of trial. R:66:125-26. Weber was 75 years old at the time

he testified at trial. R:67:65. Conroy was 55 at the time of trial. R:66:39.

Conroy also admitted that he did not contact anyone within the Human Resources Department (either of Abraham Chevrolet or of Abraham Chevrolet's parent company) regarding the alleged order to fire Weber, even though Conroy knew that remedy was available to him. R:66:93-94; R:67:125-26. Indeed, prior to his termination, Conroy never made any complaints to that department at all. R:67:43, 125.

Conroy was fired on January 15, 2001. R:66:153; AP:3a. At the time Conroy's employment was terminated, Bledsoe intended to eliminate, or at least reduce, the commercial department and increase the retail component of the dealership. R:65:91-92, 130; R:66:98-99; R:67:20, 122. When firing Conroy, Bledsoe thus told him that he was being let go because Bledsoe wanted to go in a "different direction." R:65:62; R:66:47; AP:3a. However, because the employment of Bledsoe himself was terminated shortly thereafter, on April 7, 2001, the contemplated changes to the commercial department never occurred. R:65:63; R:66:90, 189.

Following his termination, Conroy sought unemployment compensation and, in doing so, he discovered that Bledsoe's stated reason for terminating Conroy's employment was because of "unsatisfactory performance." R:66:47-48, 158; AP:3a. At that point, Conroy contacted Roberta Bonavia, the Human Resources Director of Abraham Chevrolet's parent company. R:67:4, 9; AP:3a-4a. Conroy did not initially allege at that time, however, that he had been fired because of his age. R:66:95; R:67:7-8. Instead, Conroy conveyed to Bonavia his alleged belief

that he was terminated for refusing to fire Weber. R:67:7-8.

Bonavia investigated Conroy's allegations. R:67:5; AP:4a. As part of that process, she sought and obtained facts and figures regarding Conroy's job performance. R:67:33. Although Bledsoe had told Conroy, at the time of Conroy's termination, that Conroy had done a "good job," Bonavia concluded that Bledsoe had been trying to be kind to Conroy – and spare his feelings – by not telling him that he was being fired for poor performance. R:66:47; R:67:9-10, 46; AP:4a. Bonavia's experience was that managers commonly avoided telling employees that they were fired because of poor work. R:67:9-10, 46.

Bledsoe emphatically denied that Conroy was fired either because of his age or because he refused to fire Weber. R:66:189. Consistent with Bledsoe's denial, at the conclusion of her investigation, Bonavia "found nothing to substantiate [Conroy's] claims." R:67:82. Instead, Bonavia concluded that Conroy's unsatisfactory performance was the true reason for terminating his employment. R:67:18. Nevertheless, during a conversation with Bonavia, Bledsoe agreed to change the reason for Conroy's termination from "unsatisfactory performance" to "other." to enable Conroy to obtain unemployment compensation. R:66:158; R:67:18; AP:4a.

Conroy's job performance was unquestionably deficient – a fact that Bledsoe had discussed with Abraham Chevrolet's controller prior to terminating Conroy. R:67:122. For example, each salesperson should average sales of 12 and 15

vehicles each month,[4] resulting in approximately $20,000 in gross profits per salesperson per month. R:67:38-39; AP:5a. Bledsoe's sales were never close to that amount, and he never had a month in which he sold even 12 vehicles. R:66:73-76, 102, 109-10. His performance was therefore never even in the bottom range of acceptable performance. R:67:39-42; AP:5a. In fact, his sales were more than 50 percent below expected performance – and termination of employment at Abraham Chevrolet is very common for salespersons who have such bad numbers. R:67:43; AP:5a.

Conroy was initially replaced by Joel Early, who was 44 years old at the time. R:65:62-63, 127-28, 147; R:66:57. That promotion was intended to be merely temporary. R:66:154. And, in fact, Early was shortly thereafter replaced by Randy Clark, who is two years older than Conroy. R:66:60, 183, 199. Despite the implication in Conroy's petition that Clark was not hired until after Conroy began complaining "that the company fired him because of his age" (P:17), it was in fact undisputed that Clark was hired to fill Conroy's former position before Abraham Chevrolet learned that Conroy had filed a charge of discrimination with the EEOC. R:66:172-73; R:67:29-30.

B. The Charge Conference, Verdict, and Judgment

At the charge conference near the conclusion of the trial, Conroy requested a specific instruction regarding his assertion that Abraham Chevrolet's stated reason for terminating his employment was a mere pretext. R:67:55-58, 168;

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[4] Another witness, Conroy himself, identified the benchmark as between eight and 12 vehicles per month. R:66:101-02.

AP:5a. The requested instruction, Plaintiff's Proposed Jury Instruction No. 10, labeled as a "Pretext Instruction," reads as follows:

> In determining whether the Plaintiff has proved to your satisfaction that the alleged discrimination or retaliation was a determining factor that made a difference in the employer's decision, you may consider whether the employer's explanation for the discharge is a pretext as defined below.
>
> A plaintiff may attempt to prove pretext directly by persuading you that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Disbelief of the defendant's explanation may be enough to infer discrimination or retaliation.
>
> A plaintiff may therefore show pretext with evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge.

R:35 at 16.

The district court denied the requested instruction, stating:

> In instructing the jury the court also will denied [sic] plaintiff's request to include an instruction on pretext. The pattern jury instructions for the 11th Circuit sufficiently incorporate the concept that the plaintiff wishes to get across to the jury. In addition, the Circuit has directed that juries

> really should not be instructed on the McDonnell Douglas[5] framework due to the strong likelihood of jury confusion over the individual components of the burdens shifting analysis. And there we can see Farley versus Nationwide Mutual Insurance Company, 197 F.3rd, 1322, at page 1333, which is the 11th Circuit, 1999 authority.

R:67:169.

The actual jury instructions that the district court gave included the following:

> Under federal law, it is unlawful for an employer to discharge or lay off or otherwise discriminate against any employee because of that employee's age. When the employee is at least 40 years of age.
>
> In order to prevail on this claim, the plaintiff must prove by a preponderance of the evidence that plaintiff's age was a substantial or motivating factor that prompted the defendant to terminate his employment.
>
> . . .
>
> [I]t is not necessary for the plaintiff to prove age was the sole or exclusive reason for the defendant's decision. It is sufficient if the plaintiff proves age was a determining consideration that made a difference in the defendant's decision.

R:67:181-83; R:49:15-16; AP:7a n.4. The instructions also included standard instructions on the credibility of witnesses, logical inferences from the evidence, and the

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

consequences of finding testimony to be false. R:67:176-80; AP:6a-7a n.3.

Despite the absence of a formal pretext instruction, Conroy's counsel, during closing argument, was free to argue – and did in fact argue – that the jury could, and should, find for Conroy if the jury rejected the truth of Abraham Chevrolet's stated reason for terminating Conroy's employment. For example, the closing argument of Conroy's counsel included the following:

> Now, you all listened to Mr. Bledsoe. And you'll have to decide did he have a nondiscriminatory reason for the discharge? Was it changed to other in February? And does it stand the test of credibility with you? Because if you find that age or retaliation made a difference in the employer's decision, then under the Judge's instructions, you'll be able to find liability in favor of Mr. Conroy.

R:67:136.

A similar argument came from Conroy's counsel during rebuttal closing argument:

> A claim has been made, there is no confession. Nobody ever confesses in a discrimination case. You're going to have [to] weigh the testimony and decide do you think age had something to do with it. And I would suggest to you that when the man who fires him or without any warning, any documented reports of anything going wrong and comes up here with inconsistent statements that you can read into, that inconsistency and make an inference that, perhaps, the reason that was given by them may not have been the real reason.

R:67:165; AP:13a-13b.

The jury returned a verdict in Abraham Chevrolet's favor on both Conroy's age-discrimination claim and his retaliation claim. R:51. The final judgment was entered on October 21, 2002. R:52. Conroy filed a timely motion for a new trial (R:53), which the district court denied in an extensive order entered on February 13, 2003. AP:19a-29a; R:59. Conroy filed his notice of appeal on March 14, 2003. R:60.

C. The Decision of the Court of Appeals

Conroy raised two issues on appeal. First, he contended that the district court made an erroneous evidentiary ruling. Second, he asserted that the district court erred by refusing to give Conroy's requested pretext instruction to the jury. AP:2a. The Eleventh Circuit rejected both of Conroy's arguments.

In the majority opinion, two of the three members of the appellate panel concluded that the trial court did not err in refusing to give the jury Conroy's requested pretext instruction. AP:9a-14a. As an alternative basis for affirming the judgment, they also concluded, using a harmless-error analysis, that no reversal would be warranted even if the failure to give the instruction had been erroneous, because Conroy was not "prejudiced by the district court's failure to give his requested instruction." AP:14a.

The third member of the panel disagreed with the majority on the question of whether a pretext instruction, if requested, is required in discrimination cases. AP:15a-18a (Wilson, J., concurring in result). He nonetheless concurred that no reversal was required in this case because of his conclusion that "Conroy was not prejudiced

by the trial court's refusal to give his requested pretext instruction." AP:15a.

ARGUMENTS FOR DENYING THE PETITION

Although Conroy is correct in stating that the courts of appeals are divided on the question of whether it is erroneous for a trial court to refuse a requested pretext instruction in discrimination cases, that division is not sufficiently stark or fully developed yet to warrant this Court's clarification. Moreover, even if the issue in question were suitable for this Court's intervention now, this case would not be the appropriate vehicle for resolving that issue; because Conroy was not prejudiced by the district court's refusal to give his requested pretext instruction, Conroy would not be entitled to relief regardless of how the Court resolves the issue on which the courts of appeals are divided.

A. THE CONFLICT IN THE COURTS OF APPEALS REGARDING THE NECESSITY OF A PRETEXT INSTRUCTION IS NOT YET FULLY DEVELOPED OR IN NEED OF RESOLUTION BY THIS COURT

It is true that four circuits have held that a pretext instruction is sometimes required in employment-discrimination cases. Two of those decisions pre-dated this Court's decision in *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). *See Smith v. Borough v. Wilkinsburg*, 147 F.3d 272, 279-81 (3d Cir. 1998); *Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2d Cir. 1994). The other two came after *Reeves*, and they were purportedly based, in

part, upon that decision. *See Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002)[6]; *Ratliff v. City of Gainesville*, 256 F.3d 355, 360-61 (5th Cir. 2001).

In each of these cases, the court concluded that a jury needed to be told, expressly, that it *could* make (but need not make) an inference of an employer's intentional discrimination if the jury disbelieved the employer's stated reason for its action. Otherwise, in the view of these courts, jurors might not realize that such an inference was permissible. *See Townsend*, 294 F.3d at 1241; *Ratliff*, 256 F.3d at 360-61; *Smith*, 147 F.3d at 280-81; *Cabrera*, 24 F.3d at 382.

Four other circuits – including the Eleventh Circuit in this case – have reached a contrary conclusion, opining that a pretext instruction is not invariably required in employment-discrimination cases. *See Conroy v. Abraham Chevrolet-Tampa, Inc.*, 375 F.3d 1228, 1233-35 (11th Cir. 2004); *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 791 (8th Cir. 2001); *Fite v. Digital Equip. Corp.*, 232 F.3d 3, 7 (1st Cir. 2000); *Palmer v. Bd. of Regents*, 208 F.3d 969, 975 (11th Cir. 2000); *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). The rationales of those courts was perhaps best explained in *Gehring*, in which the Seventh Circuit noted that "the *only* question the jury need answer" in employment-discrimination cases "is whether the plaintiff is a victim of intentional discrimination." *Id.* at 343 (emphasis in original). Thus, a "pretext" instruction is unnecessary.

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[6] *Townsend* was a 2-1 decision.

> Gehring also wanted the judge to instruct the jury about one permissible inference: that if it did not believe the employer's explanation for its decisions, it may infer that the employer is trying to cover up age discrimination. This is a correct statement of the law, but a judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible, but not an obligatory, inference. Many an inference is permissible. Rather than describing each, *the judge may and usually should leave the subject to the argument of counsel. Gehring's lawyer asked the jury to draw this inference; neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way. Instructions on the topic were unnecessary.*

Id. (citation omitted; emphasis added).

The respective positions of the courts of appeals on this issue, though differing, are not yet fully crystallized,[7] however, and those courts continue to refine, clarify, and reexamine their views. For example, the courts of appeals that require pretext instructions have not yet fully addressed whether and to what extent a failure to give such an instruction automatically requires reversal. As an illustration of this ongoing development, the majority of a panel in the Fifth Circuit recently opined that the *Ratliff*

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[7] Four of the regional courts of appeals – those in the Fourth, Sixth, Ninth, and District of Columbia Circuits – have not yet addressed the issue in any reported decision. However, one panel of the Fourth Circuit, in an unreported decision, has held that a pretext instruction should be given but that a failure to give the instruction is subject to harmless-error review. *See Kozlowski v. Hampton School Bd.*, 77 Fed. Appx. 133, 144-45 (4th Cir. 2003).

decision by an earlier panel was erroneous in concluding that a pretext instruction is mandatory in employment-discrimination cases. *See Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 577 (5th Cir. 2004). The majority in *Kanida* called for *en banc* reconsideration of *Ratliff*'s holding, while at the same time holding that the district court's failure to give a requested pretext instruction, even if erroneous, did not necessarily require reversal.[8]

It may well be true that this Court will eventually need to clarify this area of the law, but Abraham Chevrolet submits that it is too soon for the Court to do so now. For the moment, the issue should be left to the individual courts of appeals for further refinement and percolation. This Court should step in only if and when a stark conflict remains in the circuits after the courts of appeals have fully developed their respective positions. That point in time has not yet arrived.

B. THIS CASE PRESENTS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT IN THE COURTS OF APPEALS CONCERNING THE NECESSITY OF A PRETEXT INSTRUCTION

Even if this Court believes that it should undertake to determine, right now, the question of whether a pretext instruction is mandatory in employment-discrimination cases, this case is not the appropriate one for the Court to use to answer that question. The answer to the question

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[8] Conroy's case itself presents another example of the ongoing development of this issue in the courts of appeals. In the Eleventh Circuit's decision here, that court clarified its prior holding on this issue in *Palmer*. *See Conroy*, 375 F.3d at 1234.

makes no difference to the outcome here, because it is beyond serious dispute that the district court's failure to give Conroy's requested pretext instruction, even if erroneous, caused him no prejudice and was, at most, harmless error. The judgment in Abraham Chevrolet's favor therefore survives intact regardless of whether the district court erred in declining to give Conroy's requested instruction.

All three members of the panel in the Eleventh Circuit agreed that Conroy suffered no prejudice from the absence of a pretext instruction. *See* AP:13a-14a; AP:17a-18a (Wilson, J., concurring in result). And the applicability of a "harmless error" analysis in cases of this nature is something on which the courts of appeals are not divided; even the courts of appeals that require the use of pretext instructions have not held that the failure to give such an instruction automatically requires reversal irrespective of whether a plaintiff demonstrates that he or she suffered prejudice.[9]

Moreover, the members of the panel below were certainly correct in concluding that Conroy sustained no prejudice from the district court's refusal to give a pretext instruction. In that regard, it must be remembered that Conroy's case was extraordinarily weak. He presented two theories of liability: (1) that he was fired because of his age; and (2) that he was fired because he refused to terminate Weber. The uncontroverted evidence, however, was

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[9] Although Conroy attributes such a view to the Tenth Circuit by virtue of the *Townsend* decision (P:15), nothing in *Townsend* supports the suggestion that that court will automatically reverse, without regard to prejudice, whenever a trial court fails to give a requested pretext instruction.

that Conroy was replaced on a permanent basis by Clark, a man two years older than Conroy, and that Weber continues to work at the dealership to this day.

The trial court recognized the significance of these facts. In denying Conroy's motion for a new trial, the court noted that "[t]he uncontroverted evidence presented at trial was that the Plaintiff was replaced on a permanent basis by a man who was one year older (Randy Clark), and Dick Weber, age 70, is still employed at the dealership. Other trial evidence also undercut Plaintiff's allegations." R:59:3. And, indeed, there *was* more.

Conroy himself testified that the manufacturer standard for commercial sales is 12 vehicles per month. He also testified that he never sold 12 vehicles in any month, much less averaging 12 vehicles in the ten months he worked for Abraham Chevrolet. Additionally, the other salespersons in his department (apart from Weber) sold an average of only three or four vehicles per month – and those vehicles were not sold at acceptable profit levels. Conroy's excuse that he was not responsible for his deficient performance and that he needed 18 months to get up to speed was obviously rejected by the jury. The only person who was selling cars and generating money for the dealership was Weber, who continues to work there.

In the face of the evidence, it is hardly surprising that the jury returned a verdict in Abraham Chevrolet's favor. The jury was squarely asked to make a finding that Abraham Chevrolet engaged in intentional discrimination against Conroy – and that its articulated reason for discharging him was false. It did not do so, and its decision cannot reasonably be portrayed as the product of a misled or confused trier of fact.

Indeed, the evidence presented, jury instructions given, and arguments advanced made it obvious to the jurors that they could find for Conroy if they disbelieved Abraham Chevrolet's proffered reasons for terminating Conroy's employment. To suggest, as Conroy does, that the jury had to be told that it could make such an inference does not give jurors enough credit.

The entire focus of this case – by both sides – was the truthfulness of Abraham Chevrolet's stated reason for firing Conroy. Indeed, Conroy's counsel aptly described the entire trial when he told the district court at the charge conference that "[t]his is a pretext case." R:67:50. Consistent with that view, Conroy's attorneys devoted almost the entirety of their closing arguments (except for their discussion of Conroy's claimed damages) to the question of whether the jury should believe Abraham Chevrolet's proffered reason for Conroy's discharge. *See* R:67:127-39, 157-66.

No juror could possibly have had the slightest doubt that he or she could find for Conroy if the jury rejected the truth of Abraham Chevrolet's stated reason for terminating Conroy. That was precisely what Conroy's counsel, during closing arguments, expressly asked the jury to do. *See* R:67:136, 165. And, of course, neither the district court nor Abraham Chevrolet's counsel ever suggested, even remotely, that the jury could not properly make the inference that Conroy was asking the jury to make. Everyone in the courtroom – including the jurors – unquestionably understood that Conroy's claims stood or fell depending on whether Abraham Chevrolet was telling the truth on the

reason why Conroy was discharged.[10] Despite the protestations to the contrary by Conroy, no instruction was necessary to convey that point to the jury – and no prejudice resulted to him from the absence of such an instruction. The jury here merely chose to reject Conroy's factual contention that Abraham Chevrolet was lying in its explanation for Conroy's termination.

Thus, the record in this case reveals unequivocally that the presence or absence of a pretext instruction had no effect here. This Court would therefore be engaging in a mere academic exercise if it used this case to determine whether and to what extent a pretext instruction is required in employment-discrimination cases. Although that question is undoubtedly an important one, Abraham Chevrolet suggests that this Court's scare resources and valuable time should instead be devoted to cases presenting important questions to which this Court's answers actually affect the outcomes. *See, e.g.*, *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). That is not the situation here.

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[10] As the district court recognized in denying Conroy's motion for a new trial, Conroy "rests his argument that an instruction on pretext was essential in this case upon the contention that the Defendant's agents were not credible witnesses." R:59:4.

CONCLUSION

For the foregoing reasons, Abraham respectfully requests that the Court deny Conroy's petition for a writ of certiorari.

Respectfully submitted,

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